

Before

James C. Peck, Jr.
Arbitrator

In the Matter of Arbitration Between:

**FRATERNAL ORDER OF POLICE,
LODGE NO. 5**

V.

**AAA Case No. 14 390 00573 12
P/O Veronica Figueroa**

THE CITY OF PHILADELPHIA

Hearing Date: May 1, 2014

Decision Date: June 27, 2014

Appearances:

For the Union -

Marc L. Gelman, Esq.
Jennings Sigmond, PC

For the City of Philadelphia -

Toi Shields, Esq.
Senior Attorney
Law Department
City of Philadelphia, Pennsylvania

Procedural Background:

This arbitration was conducted pursuant to a collective bargaining agreement between the City of Philadelphia, Pennsylvania, and Fraternal Order of Police, Philadelphia Lodge No. 5, which is the recognized exclusive collective bargaining representative for a unit of police officers employed by the City of Philadelphia. Currently, the parties are operating under the continuing terms of a collective bargaining agreement with a term of July 1, 2009 through June 30, 2014.¹

The instant matter arises from a grievance filed by the Union on behalf of Police Officer Veronica Figueroa - Judge². The grievance alleges that Officer Figueroa was suspended for 30 days with Intent to Dismiss, without just cause. The grievance was subsequently denied by the City. When the issues of this dispute could not be resolved under the terms of the contractual grievance-arbitration procedure, the underlying grievance was referred to the American Arbitration Association for selection of a neutral arbitrator. Subsequently, by letter dated November 15, 2012, the undersigned was appointed arbitrator in this matter.

A Notice of Hearing issued on February 19, 2014 scheduling a hearing for May 1, 2014. The Hearing in this matter took place at the offices of the American Arbitration Association, 12th Floor, 230 South Broad Street, Philadelphia, Pennsylvania. Both parties were represented by counsel, and at the hearing were afforded the opportunity to examine and cross-examine witnesses and to introduce relevant exhibits. The grievant, Police Officer Veronica Figueroa, was present, participated fully in the proceeding, and testified on her own behalf. Thereafter, both parties submitted letter briefs to the Arbitrator.

¹ The collective bargaining agreement was received into evidence as Joint Exhibit 1-A.

Issues:

Did the City of Philadelphia violate the express terms of the collective bargaining agreement by suspending Police Officer Veronica Figueroa for 30 days, and thereafter dismissing her, without just cause?

If the City is found to have violated the terms of the collective bargaining agreement, what is the appropriate remedy?

Facts:

Police Officer Veronica Figueroa was appointed as a police officer on March 24, 2008, and was assigned Badge Number 4841. Figueroa's duty assignment was the 26th District, which is located in the Kensington area of Philadelphia. In September 2009, Figueroa took maternity leave, and subsequently returned to work at the 26th District in January 2010. Upon her return to duty, in an attempt to ease Figueroa back into the routine of police duties, Figueroa was assigned to work "inside" the District, as opposed to "outside" on street duty.

According to the Grievant, upon her return to work her direct supervisor was Corporal K [REDACTED] A [REDACTED], whose responsibilities included maintaining the time and attendance records for the Police District, and tracking sick leave requests submitted by the police officers employed therein.

² The Grievant's surname name is listed as "Figueroa" on some of the Exhibits and as "Figueroa - Judge" on other documents. However, as the Grievant signed her statement to the Internal Affairs Division as Figueroa, she will be so named throughout this Award.

Grievant Figueroa asserts that Corporal A█████ took an immediate, unwanted, and untoward interest in her, of an extremely sexual nature.³ Specifically, Figueroa claims that Corporal A█████ placed her hands on Figueroa's thighs and shoulders, and leaned against her body. A█████ allegedly was open in her sexuality, and a self-described lesbian.

According to Figueroa, A█████ made repeated sexual advances, invited Figueroa to her home, and showed Figueroa photos of her other girlfriends. A█████ assertedly described in graphic detail the sort of sexual acts she wished to perform with Figueroa, including oral sex and the use of sexual toys.⁴

Police Officer Figueroa contends that she repeatedly told Corporal A█████ that her touching and sexual conversations made her uncomfortable, and asked her to stop. When A█████'s conduct persisted, Figueroa complained to her supervisor, Sergeant N█████ S█████; and later to the District Commander, Captain M█████ C█████.

Despite these complaints to management, the alleged sexual harassment continued. Thereafter, on November 30, 2010, Officer Figueroa filed a *Complaint* with the Pennsylvania Human Relations Commission. Police Management at the 26th District, including Corporal A█████, was duly notified. According to Figueroa, an attempted accommodation was made, and Figueroa was relieved from working in the Operations Room with Corporal A█████, and was assigned to street patrol duties.

As a result of the sexual harassment, Officer Figueroa began using excessive sick time, in order to avoid contact with her harasser, Corporal A█████. On August 9, 2011, Figueroa was issued a *Warning Letter – Use of Five Undocumented Sick Days*, which included ██████ days without medical certificates. Among the sick days used by Figueroa were December 22, 2010 and June 7, 2011.

³ For specific details, see **Union Exhibit 2**, which is a *Complaint* filed by Figueroa before the Pennsylvania Human Relations Commission, and **Union Exhibit 3**, a *Complaint* before the US Equal Employment Opportunities Commission (EEOC), both filed on May 23, 2011. See also **Union Exhibit 4**, *Plaintiff's First Amended Complaint* filed in the U. S. District Court for the Eastern District of Pennsylvania on October 12, 2012.

⁴ See **Union Exhibit 4**, page 3.

Although Figueroa submitted medical certificates for those two dates, from the office of a Dr. James C. Rossi of Levittown, PA, those certificates were rejected by Corporal A [REDACTED], since they were alleged to be irregular.⁵

It was during this period, according to Officer Figueroa, that Corporal A [REDACTED] commenced a campaign to harass Figueroa for rebuffing her unwanted advances, and also began to retaliate against Figueroa for filing the Complaint before the Pennsylvania Human Relations Commission.

Specifically, on March 8, 2011, Corporal A [REDACTED] filed a Complaint with the Police Department's Internal Affairs Division, alleging various acts of misconduct by Officer Figueroa. A [REDACTED] asserted that Officer Figueroa was attempting to extort \$100 per week from the father of one of her children, in exchange for visitation rights. A [REDACTED] also advised Internal Affairs that Officer Figueroa had submitted fraudulent sick notes in order to cover for absences from work.

The Internal Affairs Investigation:

Lt. Lorraine Dusak of the Internal Affairs Division launched an investigation of Officer Figueroa's alleged misconduct. During the course of the next 6 months Dusak interviewed, and took statements from, Corporal A [REDACTED], Sgt. N [REDACTED] S [REDACTED], Police Officer J [REDACTED] F [REDACTED], Lt. J [REDACTED] F [REDACTED], Lt. F [REDACTED] S [REDACTED], and Sgt. F [REDACTED] E [REDACTED]. Lt. Dusak also interviewed a civilian witness, E [REDACTED] M [REDACTED], who was the [REDACTED] for Dr. Rossi in Levittown. Lt. Dusak amassed and reviewed numerous documents, including sick leave records and sick leave excuse forms.

⁵ During the Hearing in this matter, Officer Figueroa admitted that she had concocted the two medical certificates, ostensibly issued by Dr. Rossi, in order to cover for days when she called in sick to avoid Corporal A [REDACTED].

On September 13, 2011, Lt. Dusak interviewed the Grievant herein, who was represented by FOP attorney, Gerald Stanshine. This apparently was the final interview of Dusak's investigation. Officer Figueroa candidly admitted to Dusak that she had falsified two sick notes, claiming that she had obtained a blank sick note from a friend named "Janette" and had filled it out herself. Figueroa also admitted that she had never sought any medical treatment from Dr. Rossi.

On Page 3 of the transcription of Dusak's interview with Figueroa, Figueroa says of her accuser, "I took sick days off because I was uncomfortable at work due to the sexual harassment I was receiving from Cpl. A [REDACTED]. I also received retaliation from Cpl. A [REDACTED] after she learned I had gone to the FOP." Thus, this presented to Dusak a possible mitigating rationale for Figueroa's admitted misconduct. However, Dusak did not interview or re-interview any witnesses after being presented with the sexual harassment issue. This also was apparently not the first time IAD had heard Figueroa's claim of sexual harassment by A [REDACTED]. In February 2011, Figueroa met with Lt. McKinley of the IAD - EEO Unit about the sexual harassment complaint she had made against A [REDACTED].

After more than seven months of investigation, Lt. Dusak issued an *Internal Investigation Report*, dated October 18, 2011.⁶ This Report essentially exonerated Officer Figueroa regarding the allegations of extortion of her child's father, but concluded that Figueroa had falsified the two sick notes in question. In the "Investigative Analysis" part of the Report, there was no mention of Figueroa's claim of sexual harassment.

The Discipline:

On or about February 22, 2012, Officer Figueroa participated in a Police Board of Inquiry (PBI) Hearing where she was charged with a violation of Article 1 of the Disciplinary Code, *Conduct Unbecoming -- Making a false entry in any Department record or report.*⁷

⁶ This document has been received into evidence as **Exhibit City 1**.

⁷ See **Joint Exhibit 2**, Philadelphia Police Department Disciplinary Code, May 1, 2010.

The PBI Panel, which consisted of Police Captain J. W. [REDACTED], Police Lt. C. K. [REDACTED], and Officer K. V. [REDACTED], found Officer Figueroa guilty as charged, and recommended unanimously that she receive a 20 day suspension, without pay. This recommendation was rejected by Police Commissioner Charles Ramsey on February 27, 2012. Police Commissioner Ramsey determined that termination was warranted.

Thereafter, on March 2, 2012, Officer Figueroa was placed on 30 day suspension and served with a Notice of Termination, effective April 2, 2012, for submitting two fraudulent sick notes covering absences on December 22, 2010 and June 7, 2011.

Analysis and Discussion:

As stated in the introduction of this Award, the issue to be decided herein is whether the City violated the terms of the collective bargaining agreement by suspending Officer Veronica Figueroa for Conduct Unbecoming an Officer, Section 1.00: Unspecified.

A review of the Police Department Disciplinary Code establishes that the penalty for a violation of Article 1, Section 010-10, "*making a false entry in a Department record or report*", is 5 days to dismissal for a first offense. The Introduction to the Disciplinary Code notes:

"Penalties recommended by either the Police Board of Inquiry or commanders for offenses listed shall be within the prescribed limits. The Disciplinary Code shall in no way limit any penalty which the Police Commissioner may impose. The Police Commissioner is the final authority on all disciplinary matters."

Thus, a strict mechanical application of the Discipline Code would result in the unanimous recommendation of the Police Board of Inquiry being vacated, and the ultimate sanction of discharge being imposed, instead of a 20 day suspension.

Discharge is the most extreme workplace penalty, and has been referred to as "industrial capital punishment", or as the equivalent of "permanent exile".⁸ While discharge is often viewed as part of a disciplinary continuum, that analysis is certainly not valid in a case like this, where discharge was the first step in the disciplinary progression, and not the last step.

Further, discharge has the effect of severing an employee where there is no longer any hope of rehabilitation. The sole purpose of discharge is to unburden the Employer from an individual whose conduct has become intolerable. Discharge abolishes the employment relationship, while a disciplinary suspension is designed to improve it.⁹

If the Philadelphia Police Department had totally clean hands, and if there were no mitigating circumstances whatsoever; perhaps Police Commissioner Ramsey's decision to overrule the Police Board of Inquiry and discharge Officer Figueroa could be sustained. However, there is more than ample evidence in this case that the Police Department failed to follow its own procedures as set forth in Directive 97, Equal Employment Complaint Procedures (12-20-99).¹⁰

Directive 97 contains an exhaustive list of prohibited conduct which is viewed by the City as sexual harassment; and provides for disciplinary action, up to and including dismissal, for any employee or supervisor who engages in such prohibited conduct. Further, any supervisor or administrator who allows such conduct to occur without taking appropriate action is subject to disciplinary action. Here, Corporal A [REDACTED], with the knowledge of superior officers, was apparently permitted for more than a year to engage in a campaign of misconduct specifically prohibited by Directive 97.

⁸ Schroeder, "Discharge: Is it Industrial Capital Punishment?" 37 Arb. J. No. 4, 65 (1982).

⁹ Red Cross Blood Serv., 90 LA 393, 397 (Dworkin, 1988).

¹⁰ Admitted into evidence as **Union Exhibit 1**.

I find that the evidence is more than sufficient to establish that Officer Figueroa complained about being sexually harassed, not only to Sgt. S [REDACTED], but also to 26th District Commander, Capt. C [REDACTED]. The Police Department was certainly placed on notice of the possibility that Corporal A [REDACTED] was engaging in highly inappropriate conduct when Officer Figueroa filed her initial Complaint before the PHRC in November 2010. Yet, the City took no action to reign-in Corporal A [REDACTED], or to remove Officer Figueroa from what was for her a hostile work environment. In this regard, the Police Department failed in its duty to provide Officer Figueroa with a harassment-free workplace.

During the Arbitration Hearing in this matter, Police Chief Ramsey expressed chagrin that Grievant Figueroa and Corporal A [REDACTED] had not been separated during the pendency of the investigation into Figueroa's charges of sexual harassment. In hindsight, such a proactive measure by management might have obviated the need for Officer Figueroa to feign sickness.

Finally, of particular concern to me is the fact that Corporal A [REDACTED] appears to have used the Police Department's Internal Affairs procedures as a cudgel, to retaliate against Officer Figueroa for spurning her unwanted sexual advances. The IAD investigation found no evidence to support A [REDACTED]'s bogus claim that Officer Figueroa was attempting to extort the father of her child. Given the timing and context of A [REDACTED]'s complaint to IAD about this non-issue, it appears that A [REDACTED] acted maliciously in raising this contention, and she apparently did so without suffering any repercussions.

No arbitrator will condone employee dishonesty, or the falsification of official documents, especially by sworn police officers. However, in a situation such as exists in the instant case, it is understandable that an employee, who is being sexually harassed, would resort to self-help. With the exception of her two sergeants, Figueroa's apparently legitimate complaints were ignored by those in command.

In its brief, the City relies upon a recent arbitration award sustaining the discharge of another police officer, Gerard Corrento, who falsified sick leave slips. While facially similar, one factor distinguishes the instant case from the Corrento¹¹ case, decided by arbitrator David J. Reilly, Esq. earlier this year. In the Corrento case the grievant falsified sick leave slips solely to avoid discipline for excessive use of sick leave. In the instant case, Officer Figueroa falsified sick leave slips to avoid further torment from Cpl. A [REDACTED]. The two situations are not morally equivalent.

There is no question that Officer Figueroa was wrong to falsify the sick slips, and she must pay the price. All police officers reading this award should understand that employee dishonesty is subject to discipline, and will be dealt with accordingly. Figueroa has admitted her mistake, and must pay a penalty appropriate and proportionate to the offence. However, that penalty in these circumstances is not discharge.

¹¹ AAA Case No. 14 390 00193 13, February 27, 2014.

AWARD

Based on the evidence, and the discussion as set forth above, the undersigned makes the following award:

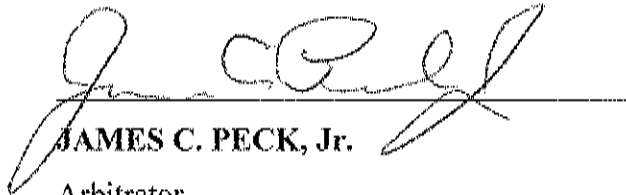
The grievance alleging that the Police Department violated the collective bargaining agreement by terminating Officer Veronica Figueroa is hereby **sustained**. Consistent with the recommendations of the Police Board of Inquiry, the discharge is converted to a suspension of 20 days, without pay.

The City is directed to reinstate Officer Figueroa with full back pay, less 20 days, and to make her whole for any loss that she has suffered as a result of her termination.

All discipline related to Officer Figueroa's unexcused absences during the period of January 1, 2010 through April 2, 2012 is to be expunged from her record.

The City and FOP Lodge 5 are further directed to enter into negotiations with regard to Officer Figueroa's work assignment, so as to minimize the possibility of future sexual harassment.

Finally, I am retaining jurisdiction over this matter for the purpose of resolving any disputes concerning the calculation, implementation, or compliance with any aspects of this remedy.



JAMES C. PECK, Jr.

Arbitrator

Wallingford, Pennsylvania

June 27, 2014